MPOEs), the owner must pay for the "additional network cable and network facilities required to install the additional" LLDPs. We interpret the word "additional" so as to include changed LLDPs as well new LLDPs. In light of our conclusion that Pacific is prohibited by § 453 from discriminating among customers seeking to reconfigure MPOEs, we further interpret this term of the 1992 Settlement to confer on the utility an obligation to effect changes to LLDPs or MPOEs if the customer requests a change, and so long as the customer pays for the cable and facilities required to effect the change.[9] At the same time, we recognize that a customer's request to add or change an LLDP or MPOE may not be technically feasible. In such a situation, the utility would be obligated to work with the customer to accommodate the customer's request in a manner that is technically feasible. Pacific has not asserted anywhere in the record before us that it is technically constrained from making the change requested, so we presume the changes IAC requests are technically feasible.

Pacific does claim, however, that its tariffs allow it to "consider requests for additional MPOEs and rearrangement of demarcation points on existing continuous property, but the tariffs do not require us to honor each and every such request." (See Pacific's Response to Appeal, p. 19.) Pacific cites to its tariff A2, 2.1.36 which refers to the "Special Construction of Exchange Facilities". Tariff A2, 2.1.36(B)(1)(e) does state that "[t]he provision of any of the above listed special construction shall be entirely at the option of the Utility [footnote omitted]". We have already concluded that because Pacific has honored the

[9] While we do not consider the language in Pacific's tariff to be ambiguous, to the extent that it does not explicitly require Pacific to make LLDP changes at a customer's request, we note that where a tariff is unclear or ambiguous, we construe the tariff against the utility. (45 CPUC2d 263, 269 (D.92-08-028), citing 4 CPUC2d 26, 33 [D.91934] and 60 CPUC2d 74, 75 [D.64022].)

request of one or more property owners to reconfigure MPOEs on existing continuous property, but is refusing to honor IAC's request, Pacific is acting in violation of § 453. Consequently, to the extent that Pacific's tariff allows it to discriminate between customers seeking to relocate one or more MPOEs on existing continuous property, Pacific must revise this tariff language.

The facts before us show that the property owner, IAC, entered into an agreement with "CoxCom, Inc., a Delaware corporation d/b/a Cox Communications Orange County" whereby CoxCom would provide telecommunications facilities and services to IAC. (See Exhibit B to IAC's Complaint.) CoxCom and IAC also entered into an agency agreement to enable CoxCom to act on IAC's behalf in arranging for Pacific to "provide a single Minimum Point of Entry" to IAC's properties. (See Exhibit A to IAC's Complaint.) On IAC's behalf, CoxCom repeatedly asked Pacific to reconfigure Pacific's facilities on the IAC properties so as to create a single MPOE as IAC requested. In its communications, CoxCom stated clearly that it was requesting a reconfiguration of Pacific's facilities on behalf of the property owner. (See Exhibits A, F, and I to IAC's Complaint.) In each instance, Pacific ignored the fact that CoxCom was acting as an agent for the property owner. Instead, Pacific insisted that CoxCom was seeking itself to purchase facilities from Pacific. Based on that premise, Pacific consistently refused to "sell" its facilities to CoxCom.

IAC has requested, and is entitled to obtain, a reconfiguration of telecommunications facilities on existing continuous property pursuant to both the terms of the 1992 Settlement as we interpret those terms in light of § 453. Pacific is entitled to be compensated for the additional network cable and facilities, again, pursuant to both the Settlement and Pacific's tariffs. IAC has stated its willingness to pay for the network cable and facilities required to effect the reconfiguration it requests. (See Exhibits F and I to IAC's Complaint.)

Despite this, Pacific continues to refuse to perform the reconfiguration a property owner has rightfully requested.

For these reasons, we reject Pacific's claim that IAC and/or CoxCom have requested to purchase Pacific's facilities. Rather, we order Pacific to effect promptly the reconfiguration IAC has requested.

8. Applicability of PU Code § 851

Pacific asserts that IAC's request for reconfiguration of MPOE's on IAC's properties constitutes a forced sale of Pacific's facilities, invoking PU Code § 851. In a letter to CoxCom's attorney, dated January 15, 1998, Pacific noted that in 1993, it "turned over to the building owner's control" the INC cable which existed on IAC's properties, but had retained Network Distribution Cable "as Pacific's cable". (See Exhibit G to IAC's Complaint.) We note also Pacific's configuration of its facilities on IAC's properties, which include "primary MPOEs" and "secondary MPOEs".

Neither the Settlement nor D.92-01-023 specifically addressed "primary" and "secondary" MPOEs. Indeed, we cannot find the words "primary MPOE [or LLDP]" and "secondary MPOE [or LLDP]" anywhere in the Settlement document. An MPOE, or LLDP, is defined in the Settlement as follows:

> 1. The purpose of the Local Loop Demarcation Point is to separate the responsibility of the utility from the responsibility of the building owner/customer by
>
>   a. designating the end of the local loop or end of the network facility and by
>
>   b. defining the beginning of the INC, if any, provided by the building owner.

2. The Local Loop Demarcation Point may also be referred to as the Minimum Point of Entry ("MPOE") or Minimum Point of Presence ("MPOP") for the purpose of defining the end of the network facilities provided by the utility.

3. The Local Loop Demarcation Point will be located at the point of entry at the entrance facility, except as set forth in Section VIII, below. Utilities will not be required to place LLDPs on more than one floor in a multi-story building.

Given that the LLDP or MPOE was and is intended quite plainly to separate the utilities' facilities from the property owner's facilities, we see no room within this definition for "primary" and "secondary" MPOEs. Since the MPOE is the dividing line between the facilities of two entities, the utility cannot continue to own facilities on the property owner's side of the MPOE. Such an arrangement is not discussed in the 1992 Settlement, by the comparable language in Pacific's tariff (Schedule Cal P.U.C. A.2.1.20(B)1) , or by the FCC's definition of MPOE.

Notwithstanding our conclusion that the Settlement cannot accommodate continued utility ownership of facilities on the property owner's side of the MPOE, we note that the entire question of primary and secondary MPOEs is mooted by our earlier conclusion that a property owner has the right to request, and Pacific must perform, a reconfiguration of the MPOE(s) on a customer's property. Thus, we do not decide here whether it was or was not appropriate for Pacific to designate both "primary" and "secondary" MPOEs on IAC's property. Rather, it is IAC's request to reconfigure the MPOEs which governs.

We do conclude here, however, that by operation of law Pacific cannot continue to own facilities on the property owner's side of the MPOE once the MPOE is reconfigured as IAC requests. Once the MPOEs on IAC's properties are reconfigured, and to the extent that the reconfiguration moves the MPOEs in the

direction of Pacific's facilities rather than towards the property owner's facilities, Pacific will no longer own the facilities on IAC's side of the MPOE. Thus, the facilities will no longer be used and useful to Pacific. Therefore, PU Code § 851 is not applicable, as it pertains to the disposition or encumbrance of property "necessary or useful in the performance of [the utility's] duties to the public."

Pacific claims that, pursuant to the 1992 Settlement, it was required to transfer only embedded INC to property owners.

> Neither the Settlement Agreement nor our implementing tariffs require us to relinquish or sell other useful network plant. Indeed, our tariffs expressly reserve our rights to retain network distribution cable for current or future use. (See Pacific's Response to Appeal, p. 22.)

Pacific relies on tariff language which reserves to Pacific "the right to . . . retain ownership of existing distribution cable facilities . . . that may be required for current or future use." (See Schedules Cal. P.U.C. A2, 2.8.1(D)(6); A8, 8.4.1(B)(3).) Because we conclude that Pacific must relocate the MPOEs on IAC's property as IAC requests, and any affected network distribution cable becomes by operation of law intrabuilding network cable, Pacific will no longer own the affected network distribution cable. Consequently, it cannot choose to retain ownership of facilities which, by operation of law, have transferred to the property owner.

This result is entirely consistent with the 1992 Settlement's treatment of the INC transferred to the incumbent utilities effective August 8, 1993. Pacific's network distribution cable was transferred to property owners, and became intrabuilding network cable. At that time, Pacific did not request review of the transfer of INC pursuant to § 851, nor did Pacific assert that it retained

ownership of the NDC. No § 851 review is necessary now.[10] Further, even if we were to apply § 851, no review of this transfer of facilities would be necessary, as the section states that no public utility will dispose of or encumber necessary or useful property "without first having secured from the commission an order authorizing it to do so." In D.92-01-023, by approving the 1992 Settlement, we authorized this very type of network reconfiguration at a customer's request.

This is not a forced sale of Pacific's facilities. Indeed, this is not a sale of facilities at all. Rather, this case involves a customer's request for reconfiguration of facilities and relocation of MPOEs on the properties. Indeed, in a letter to CoxCom, dated February 3, 1998, Pacific's attorney, Theresa L. Cabral, acknowledged that a sale of facilities was not at issue: "We do agree that Cox is not 'purchasing' any part of Pacific's distribution network". (See Exhibit J to IAC's Complaint.) In addition, Pacific's witness, Michael Shortle, testified in response to a question from Pacific's counsel as follows:

> Q. Does relocation of an MPOE involve sale of Pacific's network distribution cable to your knowledge?
>
> A. No, not to my knowledge.
> (Vol. 3, Reporter's Transcript [RT], p. 306.)

Despite these concessions, Pacific has continued to assert, even in its Response to IAC's Appeal, that CoxCom and/or IAC seek a "forced sale" of Pacific's facilities. In light of its own admission that relocating an MPOE does not involve or constitute a sale of network distribution cable, we find Pacific's claim to be without merit.

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[10] We disagree, however, with CoxCom's assertion that § 851 applies only to utility property transferred to another utility.

9. Applicability of PU Code §§ 761 and 762

Complainants claim that PU Code §§ 761 and 762 are invoked by their complaint. Sections 761 and 762 state in pertinent part as follows:

> 761. Whenever the Commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the Commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed.
>
> 762. Whenever the Commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility...ought reasonably to be made, or that new structures should be erected...to secure adequate service or facilities, the Commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order.

While these standards may be more applicable in a rulemaking proceeding, they nonetheless can be applied to a complaint case. Indeed, §§ 761 and 762 are often used in complaints raising environmental issues. We note also, however, that the language of these sections, on its face, is not limited to environmental issues. As competition unfolds in both the telecommunications and electricity markets, we may need to authorize parties to file complaints raising issues of fairness and equity pursuant to these sections. Because we are resolving this complaint on other grounds, we decline at this time to invoke these sections to support this complaint.

10. Recovery Of Pacific's Investment

Pursuant to the 1992 Settlement, Pacific transferred all INC to property owners. D.92-01-023 summarized the utilities' recovery of investment as follows:

> Recovery of embedded INC investment may be accomplished either by way of standard depreciation expense recovery over the remaining life of the investment, or by way of accelerated depreciation over five years. At the end of the recovery period, the utility will relinquish ownership of the embedded INC to the building owner and will retire the investment from its books of account. (43 CPUC2d at 117.)

Pacific's investment in the transferred INC was recovered over a five-year amortization period (from August 1993 to August 1998) from the general rate base.

We are presented here with the question of how Pacific should be compensated for the embedded facilities which will become INC, by operation of law, once Pacific completes the reconfiguration IAC has requested. Because Pacific is a utility subject to the New Regulatory Framework (NRF) we must assess any compensation in light of NRF rules.

Prior to implementation of NRF on January 1, 1990, the Commission performed an evaluation of Pacific's embedded rate base. This process was referred to as the "start-up revenue requirement." (34 CPUC2d 155, D.89-12-048.) All of Pacific's embedded rate base, including outside plant and facilities, were included in the start-up revenue requirement. Subsequently, in D.94-09-065, our decision in the Implementation Rate Design phase of NRF, we adjusted rates for all of Pacific's services based on the start-up revenue requirement. (See 56 CPUC2d 117.) Consequently, Pacific is already recovering its investment in the embedded facilities included in the start-up revenue requirement which Pacific will transfer to IAC once the MPOEs on IAC's properties are reconfigured.

Some of the properties at issue in this proceeding, however, may have been constructed since NRF was implemented on January 1, 1990. In that event, those embedded facilities would not be included in the start-up revenue requirement. Pacific is entitled to be compensated for its investment in those facilities. We direct Pacific to disclose and identify the specific facilities that will become INC after the MPOEs on IAC's properties are reconfigured. We will further order the Director of the Telecommunications Division to publicly notice a workshop within 30 days of this order. The subject of the workshop will be methods of determining the value of the post-NRF facilities that will convert to INC upon reconfiguration of the MPOEs on IAC's affected properties. Based on the results of the workshop, the Telecommunications Division shall make a recommendation in a draft resolution for the Commission to consider.

12. Covenant of Good Faith and Fair Dealing

Because we have resolved this dispute on other grounds, we need not reach the question of whether Pacific has violated the covenant of good faith and fair dealing.

13. Conclusion

We find here that Pacific has violated the terms of the 1992 Settlement by failing to file a tariff setting forth the conditions under which a continuous property owner may add MPOEs. Because Pacific has failed to establish in its tariffs any conditions for adding MPOEs, Pacific has relied solely on its discretion in determining which customer requests for reconfiguring or adding MPOEs to honor and which to deny. By honoring some requests and denying others for similarly-situated customers, with no standards set forth governing these determinations, Pacific has engaged in preferential or discriminatory conduct in violation of § 453 of the PU Code. In the newly-developing competitive telecommunications marketplace, we must discourage discriminatory activity,

especially when it prevents competitors from offering their services directly to customers, thus limiting customer choice. Therefore, we direct Pacific to honor the request by IAC to reconfigure its MPOEs so as to add a new MPOE closer to the property line of each of the affected IAC existing continuous properties. We also direct that Pacific is to be compensated for network facilities built after NRF began, that is, after January 1, 1990, at net book value of the facilities which transfer to IAC. We conclude that for properties built before NRF commenced, Pacific already is recovering through standard depreciation schedules the value of its facilities and no additional compensation is warranted.

Findings of Fact

1. CoxCom is the agent for IAC for the purpose of developing advanced telecommunications systems at 45 IAC properties in Southern California.

2. As agent for IAC, CoxCom in the fall of 1997 asked Pacific to reconfigure telephone cabling at IAC properties to provide a single demarcation point, or MPOE, to which other carriers, including CoxCom's affiliate Cox California Telcom, could cross-connect.

3. Four of the IAC properties have a single MPOE, but 41 of the properties have multiple MPOEs, commonly with one local loop MPOE reaching to each building on the properties.

4. Pacific refused the CoxCom/IAC request to reconfigure network cable into a single MPOE at IAC properties where multiple MPOEs existed, and to transfer ownership of the cable on the owner's side of the new MPOE to the owner.

5. CoxCom filed this complaint on February 13, 1998, alleging that Pacific is required by law, by Commission order, and by tariff to comply with the property owner's request and to convey reconfigured cable to the property owner.

6. Pacific has honored one or more customer's request to relocate, reconfigure, or add an MPOE.

7. The 1992 Settlement states that utilities' tariffs will "specify under what conditions additional" LLDPs or MPOEs will be allowed.

8. Pacific's tariffs do not specify the conditions under which a customer may add an MPOE.

9. Pacific has not asserted that the changes IAC requests are technically infeasible.

10. The 1992 Settlement states that if a continuous property owner desires additional MPOEs or changes in existing MPOEs, the property owner must pay for the additional network cable and network facilities required to install the additional LLDPs or MPOEs.

11. By reconfiguring the MPOEs as IAC requests, all telecommunications providers, including Pacific, will be able to compete to offer service directly to the occupants of IAC's properties.

12. In D.98-10-058, our decision in the Local Competition Docket concerning rights-of-way, we adopted a policy which prohibits property owners from discriminating against providers of telecommunication services other than incumbent local exchange carriers.

13. Hearing on the complaint was conducted on June 9-12, 1998, and the case was submitted on July 27, 1998, following receipt of opening and reply briefs.

Conclusions of Law

1. The Commission's principal inquiry in a complaint case is whether there is a violation by the defendant of any provision of law or of any order or rule of the Commission.

2. Requirements for establishing MPOEs at continuous property are governed by regulations adopted by this Commission and by the FCC.

3. In D.92-01-023, the Commission approved a Settlement Agreement among Pacific and other parties, which contains a definition of Local Loop Demarcation Point (LLDP), also known as the Minimum Point Of Entry (MPOE).

4. The 1992 Settlement treated differently continuous properties built before August 8, 1993, and those built or extensively remodeled on or after August 8, 1993.

5. Pacific was required to create a single MPOE for continuous properties built or extensively remodeled on or after August 8, 1993.

6. For continuous properties built prior to August 8, 1993, known as "existing continuous property," Pacific was required to convey to property owners any cabling identified as Intrabuilding Network Cable, or INC, that had been booked by Pacific to Part 32 capital account 2426 and expense account 6426.

7. We interpret Section IV.D(3) of the 1992 Settlement to apply to both existing and new continuous property.

8. We interpret Section IV.D(3) of the 1992 Settlement so as to include changed LLDPs or MPOEs, as well as new LLDPs or MPOEs.

9. We further interpret Section IV.D(3) of the 1992 Settlement to confer on the utility an obligation to effect changes to LLDPs or MPOEs if the customer requests a change, so long as the customer pays for the network cable and facilities required to effect the change.

10. Because IAC's properties are existing continuous properties, Pacific is required by the 1992 Settlement and by § 453 to relocate the MPOE(s) on IAC's property at IAC's request, provided that IAC pays for the reconfiguration.

11. Pursuant to the definitions of MPOE established by the FCC (47 C.F.R. 68.3) and by the 1992 Settlement, the utility cannot continue to own facilities on the property owner's side of the MPOE once the MPOE on existing continuous property is reconfigured at the request of the property owner.

12. Once the MPOEs on IACs properties are relocated and reconfigured as IAC requests, by operation of law, the facilities on IAC's side of the MPOE become the property of IAC.

13. Reconfiguration of Pacific's existing MPOEs at the request of the property owner does not constitute a forced sale of Pacific's property.

14. Pacific is recovering the value of network facilities on IAC's properties built before January 1, 1990 as part of its start-up revenue requirement, which was established in D.89-12-048.

15. Pacific should be compensated for its network facilities on IAC properties built between January 1, 1990 and August 8, 1993.

16. Because Pacific is not disposing of property "necessary or useful in the performance of its duties to the public," § 851 is not applicable to the facts underlying this complaint.

17. Pacific has acted in a discriminatory manner by failing to incorporate into its tariffs, as required by the 1992 Settlement, standards for adding LLDPs or MPOEs, then by honoring requests by one or more customers to reconfigure MPOEs, but denying IAC's request.

18. Because it has refused to reconfigure and convey cable at IAC properties in the manner requested by complainants, and by failing to incorporate into its tariffs the conditions under which it will allow additional LLDPs or MPOEs, Pacific has violated the anti-discrimination provisions of P.U. Code § 453.

19. Complainants have met their burden of showing that Pacific has violated a law, rule, or Commission order.

20. The proceeding should be closed.

21. The Revised Complainants' Appeal of the Presiding Officer's Decision filed October 13, 1998 is granted to the extent discussed here.

ORDER

IT IS ORDERED that:

1. The complaint of Irvine Apartment Communities, Inc. (IAC), by and through its agent, CoxCom, Inc. dba Cox Communications Orange County, and Cox California Telcom, Inc., Complainants, vs. Pacific Bell (Pacific), Defendant, is granted.

2. Pacific is directed to reconfigure IAC's property as IAC requests, provided that Pacific is compensated both for any additional network cable and facilities, as well as for the facilities which convert to INC on any IAC properties built between January 1, 1990 and August 8, 1993. Pacific shall continue to recover, through standard depreciation schedules, the value of network facilities on IAC continuous properties built before January 1, 1990.

3. Pacific is further directed to file with the Commission, within 30 days of the date of this order, an advice letter establishing a tariff which specifies the conditions under which Pacific will add or reconfigure MPOEs on existing continuous property.

4. Pacific is further directed, within 30 days of the date of this order, to file documentation with the Director of the Telecommunications Division identifying the facilities that will become INC after reconfiguration of the MPOEs on IAC's existing continuous properties addressed by this complaint.

5. Within 30 days of this order, the Director of the Telecommunications Division shall publicly notice a workshop. The subject of the workshop will be methods of determining the value of the post-NRF facilities that will convert to INC upon reconfiguration of the MPOEs on IAC's affected properties. Based on the results of the workshop, the Telecommunications Division shall make a recommendation in a draft resolution for the Commission to consider.

6. The Revised Complainants' Appeal of the Presiding Officer's Decision is granted.

7. Case 98-02-020 is closed.

Dated December 3, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners

I dissent.

/s/ HENRY M. DUQUE
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

Attachment 5

(Nebraska PSC Decision re: MDU Access)

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers.	) Application No. C-1878/PI-23))) ORDER ESTABLISHING STATEWIDE POLICY FOR MDU ACCESS)) Entered: March 2, 1999

APPEARANCES:

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BY THE COMMISSION

On August 5, 1998, the Commission, on its own motion, opened this docket to determine appropriate policy regarding access to residents of multiple dwelling units (MDUs) in Nebraska by competitive local exchange telecommunications providers (CLECs). Notice of this docket was published in The Daily Record, Omaha, Nebraska, on August 10, 1998, pursuant to the rules of the Commission.

Cox Nebraska Telcom II, L.L.C. (Cox) previously filed a formal complaint (PC-1262) against US West Communications, Inc. (US West) with this Commission concerning access to residents of MDUs. Upon review of the complaint, the Commission was of the opinion that as competition developed further in Nebraska markets, it would be in the best interest of the public that the Commission develop a gene-

ral overall policy regarding access to MDUs. Therefore, the Commission opened this docket and Cox withdrew its complaint against US West.

The Commission began its investigation by requesting that all interested persons submit comments on this issue by September 8, 1998. On September 14, 1998, the Commission held a hearing on these issues in the Commission Hearing Room in Lincoln, Nebraska, with the appearances as shown above.

E V I D E N C E

Carrington Phillip, vice president of Cox, testified as follows: Local exchange competition should not be something that is limited only to those who are fortunate enough to own their own homes. To resolve this issue, Cox believes that it is necessary to permit all certificated carriers who want to invest in serving tenants in MDUs the opportunity to efficiently do so. Cox suggested that the Commission develop a solution that removes artificial barriers related to historical network design and the incumbent's inherent monopoly power so that competition can flourish.

In facilitating implementation of competition in the provisioning of local exchange service, Cox suggested that its proposal would strike a regulatory balance between property rights of the incumbent local exchange carrier (ILEC) and the requirements established for state regulators in the Telecommunications Act of 1996 (Act).

Cox suggested that the ILEC should be ordered to establish a minimum point of entry (MPOE) as close to the edge of the MDU property line as possible. The ILEC could retain ownership of the cable, conduit, etc. between the demarcation point and the newly located MPOE, but should receive a reasonable one-time cost-based amount to move the MPOE to the property line. Furthermore, a CLEC should pay the ILEC a one-time fee equal to 25 percent of the replacement value of this cable, conduit, etc. for access. Replacement value should be defined as the new cost of the copper wire. Replacement cost should be estimated to be $4.20 per cable foot, based on the cost of 600 pair cable.

Maintenance and repair of the facility should be accomplished by a third-party contractor approved by the ILEC and the current service provider. The maintenance and repair would be performed in accordance with mutually agreed upon national standards with the cost borne by the ILEC and CLEC on a percentage basis.

Mr. Alan Bergman, Director of State Market Strategies for US West in Nebraska, testified as follows: US West agrees strongly that the tenants in MDUs should have choice. However, Mr. Bergman emphasized that other carriers currently have an opportunity to provide MDU customers with a choice. All local exchange carriers, including US West, are required under the Act to make available for resale at wholesale rates their retail services. Furthermore, nothing is preventing CLECs such as Cox from constructing their own facilities up to the demarcation point as US West has done. Either of these methods would provide choice for MDU residents.

US West proposes that competitors should be able to use a portion of the unbundled loop and the so-called sub-loop unbundling in order to provide local service to an MDU resident. This would require that a competitor pay the cost, a one-time non-recurring charge, for the installation of a new cross-connect box at a point agreed to by the owner near the property line where the facility comes into the MDU property. Then, beyond that, the competitor would pay an average cost-based rate determined through the cost docket for the portion of the unbundled loop that it uses.

Mr. David Tews, representing the Community Associations Institute, testified as follows: The Commission should recognize the self-determinate process and the role the community associations play in maintaining, protecting and preserving the common areas, the values of the community or the value in an individually owned property within the development. To fulfill these duties, community associations must be able to control, manage, and otherwise protect their common property.

O P I N I O N A N D F I N D I N G S

After hearing testimony, reviewing briefs and other comments filed in this docket, the Commission believes that a statewide policy regarding CLEC access to residential MDUs is necessary to

protect the rights of MDU residents. The primary purpose of this order is to create a uniform framework that parties throughout the state, incumbents and competitors alike, can utilize to serve residents of MDUs. Such a statewide policy should foster competition while simultaneously providing the residents of MDUs a realistic opportunity to select their preferred telecommunications provider.

The National Association of Regulatory Utility Commissioners (NARUC) explicitly recognized the problem in its "Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications", adopted July 29, 1998. In that resolution, the NARUC Committee noted that some states, including Connecticut, Ohio and Texas, already require building owners and incumbent telephone companies to give tenants access to the telecommunications carrier of their choice. Nebraska is no different, and this Commission believes residents of Nebraska MDUs should have the same choice.

The intent behind the Telecommunications Act of 1996 was to open up the telecommunications market for competition. However, residents of MDUs have generally been unable to reap the benefits of this industry transformation.

It is true that competition has brought many desirable changes to the telecommunications industry. However, the benefits of competition have not come without a certain amount of additional costs. MDU residents must be given the opportunity to take advantage of competition if they are to be expected to bear any increased costs associated therewith. As such, the Commission believes that residential MDU properties must be opened up to competition.

In order to develop a statewide framework for access to residential MDUs, the Commission finds the following:

Upon the request of a CLEC or any multi-tenant residential property owner (Owner), an ILEC shall provide a MPOE at the MDU property line or at a location mutually agreeable to all parties. The ILEC, or a mutually agreeable third party or CLEC, as identified in a pre-approved list of third-party contractors and CLECs, must complete the move of the MPOE in the most expeditious and cost effective manner possible. Nothing contained herein shall

limit or prohibit access to MDU properties by any competitive carrier through any other technically feasible point of entry.

The CLEC or requesting Owner shall pay the full cost associated with said move. CLECs who connect to the MPOE within three years of the move's completion shall contribute on an equitable and nondiscriminatory pro-rata basis to the initial cost of said move based upon the number of CLECs desiring access to the MDU through such MPOE.

The demarcation point[1] shall remain in its current position unless otherwise agreed to by the parties. If the demarcation point remains unmoved, then the ILEC shall retain ownership of any portion of the loop between the demarcation point and the newly moved MPOE as well as any existing campus wire (jointly referred to hereafter as "campus wire"). Said CLECs shall be authorized to use the ILEC's campus wire for a one-time fee of 25 percent of "current" construction charges of the portion of the loop between the demarcation point and the newly moved MPOE based upon an average cost per foot calculation. The average cost per foot shall be derived from a sample of recently completed ILEC construction work orders for MDUs, with the resulting calculation subject to periodic Commission review. CLECs which connect to the MPOE within three years of the move's completion shall contribute on an equitable and nondiscriminatory pro-rata basis to the one-time aggregate 25 percent charge for use of the ILEC's campus wire. The portion due from each carrier shall be based upon the number of CLECs desiring access to the MDU through such MPOE.

Maintenance of the campus wire and the MPOE itself shall be performed by the ILEC, or a mutually agreeable third party or CLEC, as identified in the pre-approved list of third-party contractors and CLECs. Such maintenance shall be completed in accordance with national standards and in the most expeditious and cost effective manner possible. Maintenance expenses shall be paid by all current users of such MPOE on a pro-rata basis based upon the percentage of current customers within the affected MDU building or property on the start date of maintenance.

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[1] The demarcation point is the point at which the telephone company's facilities and responsibilities end and customer-controlled wiring begins.

Exclusionary contracts and marketing agreements between telecommunications companies and landlords are anti-competitive and are against public policy. Exclusionary contracts are barriers to entry and marketing agreements can have a discriminatory effect. Therefore, the Commission believes, with the following exception, that all such contracts and agreements should be prohibited.

The Commission is of the opinion that since condominiums, cooperatives and homeowners' associations are operated through a process where each owner has a vote in the entity's business dealings, the prohibitions against exclusionary contracts and marketing agreements should not apply to this type of entity.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that this order hereby establishes a statewide policy for residential multiple dwelling unit access in the state of Nebraska.

IT IS FURTHER ORDERED that all telecommunications providers shall comply with all applicable foregoing Findings and Conclusions as set forth above.

IT IS FURTHER ORDERED that since condominiums, cooperatives and homeowners' associations are operated through a process where each owner has a vote in the entity's business dealings, the prohibitions against exclusionary contracts and marketing agreements shall not apply to this type of entity.

IT IS FINALLY ORDERED that should any court of competent jurisdiction determine any part of this order to be legally invalid, the remaining portions of this order shall remain in effect to the full extent possible.

MADE AND ENTERED at Lincoln, Nebraska, this 2nd day of March, 1999.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

/s//Lowell C. Johnson
/s//Frank E. Landis

COMMISSIONERS DISSENTING:
//s//Daniel G. Urwiller

Chairman

ATTEST:

Executive Director